STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 233278 Oakland Circuit Court
MANUEL J. RAMOS, JR., Defendant-Appellant.	LC No. 96-148253-FH 96-148254-FH 96-148372-FH

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of possession with intent to deliver 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii), two counts of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of conspiracy to possess with the intent to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii).[1] Defendant was sentenced to mandatory minimum consecutive terms of 10 to 20 years' imprisonment for possession with intent to deliver 50 to 224 grams of cocaine, 1 to 20 years' imprisonment for possession with intent to deliver less than 50 grams of cocaine, and 20 to 30 years' imprisonment for conspiracy to possess with the intent to deliver 225 to 649 grams of cocaine. Defendant appeals as of right. We affirm.

I. Facts

The charges in this case arise out of a Narcotics Enforcement Team (NET) undercover operation where a confidential informant introduced Oakland County Sheriff Department Deputy Christopher Yuchasz to Daniel Vallone. The informant identified Vallone as a cocaine distributor. Over the next few weeks, Yuchasz cultivated a relationship with Vallone and ultimately made three undercover controlled purchases of cocaine from Vallone. Yuchasz arrested Vallone and Vallone was given the opportunity to cooperate. Vallone then identified defendant as his main supplier and indicated that defendant supplied all the cocaine sold to Yuchasz.

[1] Defendant's convictions arise out of three separate cases, 96-148253-FH, 96-148254-FH, and 96-148372-FH, that were consolidated for trial.

After his agreement to cooperate, Vallone began working for the NET officers. Vallone purchased two ounces of cocaine from defendant. This transaction was taped by police. On August 3, 1995, an undercover police officer purchased an ounce of cocaine from defendant. In September 1996, defendant was arrested in front of his house and charged in three separate cases. At the time of his arrest, defendant was in possession of $1,900 that he said was given to him by his father-in-law to purchase a washing machine and dryer. The acts charged occurred over a period ranging from November 9, 1994 to August 3, 1995.

At an evidentiary hearing on March 5, 1997, defendant attempted to have the charges dismissed based on a claimed unreasonable delay between the alleged crimes and his arrest. However, the evidence showed that the undercover operation continued after the August 3, 1995 drug deal, but the police officers' attempts to schedule additional purchases were fruitless. All attempts were curtailed by September of 1995.

II. Analysis

A. Right to a Speedy Trial

Defendant first argues the thirteen month delay between the last delivery of cocaine and his arrest was unreasonable and substantially prejudiced his ability to present a defense. We disagree.

Ordinarily, the right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, § 20, MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Although a formal charge or restraint of the defendant is necessary to invoke the speedy trial guarantees, *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987), due process can also require dismissal of charges if unjustified preaccusation delay such as alleged here deprived the defendant of the opportunity to present his defense, *People v Wyngaard*, 151 Mich App 107, 111; 390 NW2d 694 (1986).

A two-step balancing test is applied to determine whether a pre-arrest delay requires reversal of a defendant's conviction. *People v Herndon*, 246 Mich App 371, 390; 633 NW2d 376 (2001); *People v Bisard*, 114 Mich App 784, 790; 319 NW2d 670 (1982). First, the defendant must demonstrate actual prejudice, as opposed to mere speculative prejudice. *People v Adams*, 232 Mich App 128, 135; 591 NW2d 44 (1998); *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). This requires proof that his ability to defend against the charges was "meaningfully impaired . . . to such an extent that the disposition of the criminal proceedings was likely affected." *Adams, supra* at 135; *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Then, if a defendant meets this burden, the burden shifts to the prosecutor to persuade the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Bisard, supra* at 790; *Adams, supra* at 139.

On the record presented, defendant is unable to sustain his burden of demonstrating prejudice. Our review discerns only generalized allegations that prejudice would inure from loss of potentially exculpatory testimony that would have been provided by a currently unavailable witness and unspecific claims that due to the passage of time defendant was unable to remember the events surrounding the charges. We agree with the lower court that this is insufficient to

sustain defendant's initial burden of demonstrating the actual and substantial prejudice necessary to establish that his ability to defend himself was meaningfully impaired, *Adams, supra* at 135, or that he was denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997); *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987); *Wyngaard, supra* at 111-112. We are also convinced that the prosecutor's stated reasons for the delay were reasonable and not an attempt to gain a tactical advantage. *Bisard, supra* at 790; *Adams, supra* at 139.

B. Aiding and Abetting

Defendant next argues that the trial court erred in denying his motion for a directed verdict on the charges of aiding and abetting the delivery of cocaine because he was not present at the delivery. We disagree.

To support a finding that defendant aided and abetted Vallone's delivery of cocaine by acting as his supplier, the prosecutor was required to show that: "(1) the crime charged was committed by defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Lawton*, 196 Mich App 341, 351-352; 492 NW2d 810 (1992). The specific intent necessary for conviction as an aider and abettor may be inferred from all the facts and circumstances. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637. Resolution of this appeal requires analysis of the latter two elements.

Aiding and abetting includes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds that may support, encourage, or incite the commission of a crime. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991); *People v Vicuna*, 141 Mich App 486, 495-496; 367 NW2d 887 (1985). Similarly, a person aids and abets another to commit a crime where the former takes conscious action to make the criminal venture succeed. *People v Boose*, 109 Mich App 455, 470; 311 NW2d 390 (1981). Our review of the evidence allows the conclusion that defendant's actions in supplying the cocaine and assisting in its transportation provided ample direct and circumstantial evidence that, if believed by the jury, would establish that defendant took "conscious action" to support the success of the criminal venture. *People v Izarraras-Placante*, 246 Mich App 490, 496; 633 NW2d 18 (2001); *People v Davenport*, 122 Mich App 159, 162; 332 NW2d 443 (1982); *Boose, supra* at 470.

Similarly, defendant's specific intent may be inferred from the circumstances of the case. *Eggleston, supra* at 668. A witness testified that defendant "fronted" the cocaine sold to the undercover police. This would reasonably be construed to imply that defendant knew that the witness was going to consummate the criminal act of delivery of a controlled substance. *Id.* In total, the evidence presented by the prosecutor, when viewed in the light most favorable to the prosecution, would persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

On an associated issue, defendant erroneously maintains that this witness' uncorroborated testimony was insufficient to sustain defendant's conviction. However, it has long been

established that an accused may be convicted solely by uncorroborated testimony of an accomplice. *People v Ochko* 88 Mich App 737, 741; 279 NW2d 294. (1979). Apparently, the jury determined that notwithstanding his self-serving testimony, the witness was credible. The determination of credibility is the province of the factfinder, here the jury, and will not be disturbed on appeal. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

C. Prosecutorial Misconduct

Defendant next alleges prosecutorial misconduct, arguing that the prosecutor's closing argument went beyond the "bounds of propriety" and irreparably harmed defendant by prejudicing the jury's deliberations. We disagree.

Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights – error affecting the outcome of the lower court proceedings. *Aldrich, supra* at 110; *Schutte, supra* at 720.

On the record presented, defendant fails to establish either error or error affecting his substantial rights. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *Schutte, supra* at 721. Here, the challenged prosecutorial remarks, when viewed in context, can be seen as addressing defendant's allegations. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Moreover, the trial court's instructions that counsels' arguments were not evidence were sufficient to cure any lingering prejudice. *Rodriguez, supra* at 30-31; *Schutte, supra* at 721-722. Jurors are presumed to follow instructions given by the trial court. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

D. Sentencing Entrapment

Defendant's final claim of error argues that the increasing amounts of cocaine purchased by the undercover officers constituted improper "sentencing entrapment" that exposed defendant to increased sentencing exposure and violated his constitutional rights. We disagree.

Michigan courts use the two-pronged modified objective test to establish entrapment. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002); *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person similarly situated to the defendant, although otherwise law-abiding, to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *Johnson, supra* at 498. Entrapment also encompasses unacceptable conduct that, for the purpose of increasing the resultant sentence, induces a greater severity of crime than the defendant would otherwise commit. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). However, entrapment will not be found where the police simply present the defendant with the opportunity to commit the crime of which he was convicted. *People v McGee*, 247 Mich App 325, 345; 636 NW2d 531 (2001); *Ealy, supra* at 510.

In the case at bar, relief is unavailable because defendant has not demonstrated that the police conduct was so reprehensible that his conviction should be reversed. Our review of the record allows the conclusion that the continued drug sales only provided defendant with an opportunity to commit an offense that he was already predisposed to commit. *People v McGee*, 247 Mich App 325, 345; 636 NW2d 531 (2001). There is no evidence that the officers continued the sales to enhance defendant's eventual sentence. *Ealy*, *supra* at 511. Instead, the evidence established that the undercover officers were conducting an ongoing investigation that sought to explore the extent of defendant's ability to supply cocaine.

Moreover, the police conduct may not be characterized as reprehensible because defendant was an established drug supplier who was not induced to sell drugs. *McGee*, *supra* at 345. When efforts to schedule additional purchases were frustrated, the undercover officers turned the file over to the prosecutor's officer. The delay in arresting defendant after the first sale was justified to preserve an ongoing undercover narcotics investigation. *Ealy*, *supra* at 511.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette